

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTHONY M. BLACKWELL,

Defendant and Appellant.

C055969

(Super. Ct. No. 03F07408)

In 2004, defendant Anthony Blackwell was convicted of two counts of attempted voluntary manslaughter, two counts of assault and two counts of attempted robbery. Two years later, he brought a petition for writ of habeas corpus in the trial court, which was granted in part. As a result of the writ, defendant's two attempted robbery convictions were reversed. He was resentenced on the remaining voluntary manslaughter and assault convictions. Defendant appeals from this resentencing, contending the trial court's use of his juvenile adjudications to impose the upper term was unconstitutional under *Blakely v. Washington* (2004) 542 U.S. 296 [159 L.Ed.2d 403] (*Blakely*) and *Cunningham v. California* (2007) 549 U.S. 270 [166 L.Ed.2d 856].

RELEVANT FACTUAL BACKGROUND¹

In August, 2003, the Moreno brothers, Antonio and Gerardo, were working at a neighbor's home when co-defendant Bridget Coilton and another woman offered the Morenos sex for money. Although the Morenos declined the women's offer, they did agree to share some beer with them. After sharing the beers, the women left.

About 15-20 minutes later, defendant arrived at the house with a loaded .45 handgun. He walked through the door and without speaking, shot Antonio Moreno three times. Antonio and defendant struggled, during which Antonio pulled a clump of hair from defendant's head. DNA established the hair was defendant's. Gerardo then came out from the bathroom and continued to fight with defendant. During their struggle, defendant also shot Gerardo. Defendant then fled the house. Antonio had been shot with two grazing shots on either side of his head and a third shot entered his neck just below his chin. Gerardo was shot in the leg. (*People v. Blackwell* (March 6, 2006, C047701) [nonpub. opn.] .)

PROCEDURAL HISTORY

Following a jury trial, defendant was convicted of attempted voluntary manslaughter of Antonio Moreno (Pen Code, §§ 664, 192, subd. (a)),² with true findings that he personally

¹ Because the factual background is of limited relevance to the issues before us on appeal, we recount the facts in only a summary fashion.

² Undesignated statutory references are to the Penal Code.

used a firearm in the commission of the offense (§ 12022.5, subd. (a)) and personally inflicted great bodily injury (§ 12022.7, subd. (a)); attempted voluntary manslaughter (§§ 664, 192, subd. (a)) of Gerardo Moreno, with true findings that he personally used a firearm in the commission of the offense (§ 12022.5, subd. (a)); attempted robbery of Antonio (§§ 664, 211), with true findings that he discharged a firearm which caused great bodily injury (§ 12022.53, subds. (d) & (e)(1)), that he personally and intentionally discharged a firearm (§ 12022.53, subds. (c) & (e)(1)), personally used a firearm (§ 12022.53, subds. (b) & (e)(1)), and personally inflicted great bodily injury (§ 12022.7, subd. (a)); attempted robbery of Gerardo (§§ 664, 211), with a true finding that during the commission of the offense he personally discharged a firearm (§ 12022.53, subds. (c) & (e)(1)) and personally used a firearm (§ 12022.53, subds. (b) & (e)(1)); assault with a firearm (§ 245, subd. (a)(2)) on Antonio Moreno, with a true finding that he personally used a firearm in the commission of the offense (§ 12022.5, subd. (a)); and, assault with a firearm (§ 245, subd. (a)(2)) on Gerardo Moreno, with a true finding that he personally used a firearm in the commission of the offense (§ 12022.5, subd. (a)). He was sentenced to an aggregate determinate term of nine years four months in state prison, plus an indeterminate sentence of 25 years to life. (*People v. Blackwell, supra*, C047701.)

In addition, at the time these offenses were committed, defendant was on probation for possession of cocaine base for sale. (Health & Safety Code, § 11351.5). As a consequence of

his convictions, the court found defendant had violated his probation in case number 01F04190.³ Probation was revoked and denied. Defendant was sentenced to serve four years concurrently on the probation violation offense.

Defendant appealed the conviction, arguing there was insufficient evidence to support the two attempted robbery convictions. This court rejected defendant's claim and affirmed the convictions.

Co-defendant Coilton also appealed her convictions for two counts of attempted voluntary manslaughter, two counts of attempted second degree robbery and two counts of assault with a firearm. (*People v. Coilton* (July 5, 2005, C047536) [nonpub. opn.].) On appeal, Coilton contended the trial court had erred in admitting the preliminary hearing testimony of a key prosecution witness, Tasheba Watkins. We agreed and reversed the judgment. (*Coilton, supra*, C047536.)

On December 4, 2006, defendant filed a petition for writ of habeas corpus in the trial court, in which he alleged appellate counsel was ineffective for failing to raise the issue of the improper use of Watkins's preliminary hearing testimony. The trial court granted the petition in part, finding that without Watkins' testimony, the evidence was insufficient to support the attempted robbery convictions. The court, however, found there

³ This is referenced in the clerk's minutes as case number 02F044190, however, in both the probation report and the reporter's transcript of sentencing it is referenced as case number 01F04190.

was sufficient other evidence to support the convictions for attempted voluntary manslaughter and assault.

Defendant was resentenced on the attempted voluntary manslaughter and assault convictions, as well as their attendant enhancements. The court noted that prior convictions and adjudications are a basis upon which a judge can aggravate a sentence without findings being made by a jury. The court specifically stated, "I have, uh, again, looked at the past probation report that was submitted in this case and filed on August 27, 2004, which recounts, uh, [defendant's] criminal history beginning in 1995, in the juvenile system, and through 2002 when he, in fact, uh, suffered two adult convictions, one of which is a matter for sentencing case [sic] because it was a probation case that he had previously been sentenced to. [¶] And I think, based on all of those, . . . the number and seriousness and the voluminous nature of [defendant's] criminal background, notwithstanding his age, weighs much more heavy than any youthfulness he may have been [sic] at the time this serious felony was committed. So I am going to rely in imposing the upper term on [defendant] on prior numerous [sic], as well as his criminal conviction as an adult, so that is as [sic] the court's judgment and sentence." Accordingly, the court imposed the upper term of five years and six months for the attempted manslaughter of Antonio (count one) and three years consecutive for the personal infliction of great bodily injury enhancement.

(§ 12022.7, subd. (a).)⁴ For the attempted manslaughter of Gerardo (count two), the court imposed a one-year term (one-third the midterm), to be run consecutively and imposed one year and four months (one-third the midterm) on the personal use of a firearm enhancement allegation under section 12202.5, subdivision (a)(1).⁵ On the probation violation, defendant was again sentenced to the middle term of four years.⁶

DISCUSSION

Defendant contends on appeal that the court improperly aggravated his sentence, based on his juvenile adjudications. Defendant notes this issue is currently pending before the California Supreme Court in *People v. Nguyen* (2007) 152 Cal.App.4th 1205, review granted October 10, 2007, S154847. However, we can resolve this matter without addressing the issue of reliance upon juvenile adjudications as aggravating factors.

⁴ There appears to be an error in the reporter's transcript, as it indicates that defendant will be sentenced to the "upper term of five years and six months, as to violating [] section 12022.5(a)(1), imposed mandatorily and consecutively." However, there is no term actually imposed as to section 12022.5. The abstract of judgment and minute order each reflect the imposition of a 10-year term for the section 12022.5 violation.

⁵ There is no mention of the two assault convictions in the reporter's transcript. The abstract of judgment reflects that these counts and their attendant enhancements were stayed under section 654. The minute order indicates these counts were stayed under section 664 (which is obviously a typographical error).

⁶ The reporter's transcript does not indicate whether this term was to run be consecutively or concurrently. The abstract of judgment and minute order indicate the term was to run concurrently.

If a single aggravating circumstance is established "in accordance with the constitutional requirements set forth in *Blakely*, the defendant is not 'legally entitled' to the middle term sentence, and the upper term sentence is the 'statutory maximum.'" (*People v. Black* (2007) 41 Cal.4th 799, 813 (*Black*.) In other words, if there is a single aggravating circumstance that satisfies *Blakely*, "any additional factfinding engaged in by the trial court in selecting the appropriate sentence among the three available options does not violate the defendant's right to jury trial." (*Black, supra*, at p. 812.)

The prior conviction exception to the right to a jury trial on sentencing factors encompasses the circumstance that a defendant committed a crime while on probation. (*People v. Towne* (2008) 44 Cal.4th 63, 79-82 (*Towne*).) This is so because it is a circumstance that "arises out of a prior conviction and results from procedures that were conducted in accordance with constitutional requirements designed to ensure a fair and reliable result. Furthermore, the circumstance of . . . probation or parole status ordinarily is well documented in the same type of official records used to establish the fact and nature of a prior conviction" (*Id.* at p. 81.) Thus, in determining whether a defendant committed an offense while on probation, "the trial court is not required to make any factual finding regarding the charged offense. It need only determine the period during which the defendant was on probation or parole and compare those dates to the date of the charged offense, as found by the jury. The trial court may find this aggravating

circumstance to exist, without engaging in any factfinding regarding the charged offense. Accordingly, a trial court's conclusion that the charged offense was committed while the defendant was on probation or parole, like a finding of a prior conviction, does not require judicial factfinding regarding the charged offense." (*Id.* at p. 80-81.)

In sum, "the aggravating circumstance that a defendant . . . was on probation or parole at the time the crime was committed may be determined by a judge and need not be decided by a jury." (*Towne, supra*, 44 Cal.4th at p. 70-71.)

Here, to impose the aggravated term, the court indicated it was relying upon defendant's record of convictions and adjudications and further noted he was on probation at the time the current offenses were committed. In addition, the court's indication that it would also be sentencing defendant on his probation violation which arose as a consequence of these offenses suggests the court was also considering defendant's unsatisfactory performance while on probation.

Either defendant's status as a probationer when he committed these offenses or his unsatisfactory performance on probation as a result of these convictions would have been enough alone to make defendant eligible for the upper term. Each would validly serve as a basis for the upper term without having been submitted for a jury finding. Accordingly, the trial court's additional factfinding regarding aggravating circumstances did not violate defendant's right to a jury trial

(*Black, supra*, 41 Cal.4th at p. 812), and the court did not err in imposing the upper term.

As noted above, however, there do appear to be errors in the sentencing. The court indicated by its calculation, it had imposed a sentence of 24 years and 10 months. The minute order and abstract of judgment each indicate a total sentence imposed of 20 years and 10 months. There is no oral pronouncement of judgment as to the section 12022.5 enhancement on count one. There is no oral pronouncement that the sentences for the two assault convictions are stayed under section 654. There is no oral pronouncement of whether the sentence for the probation violation is to run concurrently or consecutively. Generally, when "the record is in conflict it will be harmonized if possible; but where this is not possible that part of the record will prevail, which, because of its origin and nature or otherwise, is entitled to greater credence [citation]. Therefore whether the recitals in the clerk's minutes should prevail as against contrary statements in the reporter's transcript, must depend upon the circumstances of each particular case." [Citations.] (*People v. Smith* (1983) 33 Cal.3d 596, 599.) Here, both the clerk's transcript and the reporter's transcript contain obvious errors, making it difficult to discern which is entitled to greater credence. Accordingly, we will remand the matter for correction of the sentencing errors.

DISPOSITION

The matter is remanded so that errors in the sentencing, identified in this opinion, may be corrected. In all other respects, the judgment is affirmed.

SIMS, Acting P. J.

We concur:

DAVIS, J.

NICHOLSON, J.